**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| **In the Matter of** | **)** | |
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| **Protecting the Privacy of Customers of** | **)** | **WC Docket No. 16-106** |
| **Broadband and Other** | **)** | |
| **Telecommunications Services** | **)** | |
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# PETITION FOR RECONSIDERATION OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

**Genevieve Morelli**
**Michael J. Jacobs**
**ITTA**
**1101 Vermont Ave., NW**
**Suite 501**
**Washington, D.C. 20005**

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## Table of Contents

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# PETITION FOR RECONSIDERATION OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – The Voice of Mid-Size Communications Companies (ITTA) hereby petitions for reconsideration of the November 2, 2016 Report and Order in the above-captioned proceeding.[1] As expressed in its comments on the *NPRM*,[2] ITTA maintains that the Commission lacks the requisite legal authority for the measures adopted in the *Order*.

## I. INTRODUCTION AND SUMMARY

The *Order* applies consumer privacy requirements to broadband Internet Service Providers (ISPs), who were not subject to whatever authority the Commission has over consumer privacy matters until the Commission reclassified broadband Internet access service as subject to Title II of the Communications Act of 1934, as amended (Act), in the *Open Internet Order*.[3]

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[1] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, FCC 16-148 (Nov. 2, 2016) (*Order*).

[2] Comments of ITTA, WC Docket No. 16-106 (May 27, 2016). *See Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) (*NPRM*).

[3] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Open Internet Order*). ITTA opposed the *Open Internet Order*'s reclassification of broadband Internet access services as telecommunications services subject to regulation under Title II of the Act and, therefore, disputes that Section 222 applies to broadband ISPs along with other telecommunications carriers. *See Order* at 141-44, Sec. IV.A.1. However, the Commission should not delay action to vacate the *Order* pending any revisiting of the *Open Internet Order*'s Title II reclassification.

Among other measures, the *Order* adopts customer notification and approval, data security, and data breach notification requirements.

The *Order* substantially relies on Section 222(a) of the Act[4] as legal authority for the new requirements.[5] Section 222(a) states: "IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier."[6] The *Order* "construe[s] Section 222(a) as imposing a broad duty on carriers to protect customer [proprietary information] that extends beyond the narrower scope of information specified in Section 222(c)," and further, that Section 222(c), which addresses confidentiality of customer proprietary network information (CPNI), is merely "a subset" of customers' proprietary information.[7]

ITTA maintains, however, that neither Section 222,[8] which was added to the Act by the Telecommunications Act of 1996 (1996 Act), nor any other provision of the Act, provides authority for the *Order*'s measures. Contrary to the *Order's* claims, Section 222(a) does not create any authority different from the subsections of Section 222 that follow. This is illustrated by the plain language and structure of Section 222, the legislative history of Section 222(a), and the Commission's consistent interpretation of Section 222 for over 16 years until its sudden about-face in a non-final order (a Notice of Apparent Liability in an enforcement action).

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[4] 47 U.S.C. § 222(a).

[5] *See Order* at 144-56, Sec. IV.A.2.

[6] 47 U.S.C. § 222(a).

[7] *Order* at 141, 144, paras. 333, 343. *See* 47 U.S.C. § 222(c).

[8] 47 U.S.C. § 222.

ITTA acknowledges that the *Order*'s measures are well-intentioned in that consumer choice in the use and dissemination of private information by their service providers is inarguably an important and worthy policy goal. Despite the best of intentions, however, the Commission simply does not have the imprimatur to bestow upon itself the statutory authority to adopt the *Order*'s requirements.[9] Only Congress may do that – but it did not.

## II. THE COMMISSION LACKS THE REQUISITE LEGAL AUTHORITY FOR THE MEASURES ADOPTED IN THE *ORDER*

The Commission's invention of an entirely new and muscular legal obligation under Section 222(a) of the Act simply cannot be squared with the plain language of that statutory provision, its history, and the Commission's own consistent holdings. Nor does the Commission enjoy any other legal authority to support the *Order*'s requirements. Therefore, the *Order* must be vacated.

### A. Plain Language and Structure of Section 222 of the Act

Subsection 222(a) of the Act, which begins, "IN GENERAL," is precisely that – with respect to proprietary information of, and relating to, other carriers or customers, it merely introduces that what follows will be requirements of carriers applicable to CPNI and additional duties of carriers with respect to proprietary information of other carriers. It is followed by subsection 222(b), which specifically relates to proprietary information obtained from another carrier, subsection 222(c), which proceeds to describe in minute detail a carrier's duties with respect to CPNI,[10] and subsection 222(d), which enumerates specific exceptions that allow

[9] *But see Order* at 153, para. 358 ("construing Section 222(a) as reaching customer information other than CPNI avoids the creation of a regulatory gap that Congress could not reasonably have intended. . . . Commenters that advocate a narrow construction of Section 222(a) would have us divest ourselves of authority to take action . . . . We need not and will not.").

[10] The *Order* argues that the absence of further statutory guidance on what carriers must do to protect the proprietary information of equipment manufacturers means that the confidentiality protection duty imposed on carriers under Section 222 with regard to equipment manufacturers "must" have its sole basis in Section 222(a), which "would not be possible unless Section 222(a)

(continued…)

certain uses of CPNI. Subsections 222(e)-(h) then delineate other exceptions, definitions and clarifications, but notably, *nowhere* do they refer back to subsection 222(a), though where they do refer back, they do so to subsections (b), (c), and (d). Thus, contrary to the *Order*'s assertion that "there is no textual indication that Sections 222(b) and (c) define the outer bounds of Section 222(a)'s scope,"[11] the plain language and structure of Section 222 evinces that there is no authority in Section 222(a) independent of the remainder of Section 222 relative to protecting customers' information.

Commissioner O'Rielly's dissent encapsulates the proper view of the role of subsection (a) relative to the remainder of Section 222:

> [T]here is no independent authority in section 222(a) to regulate privacy or data security, regardless of the technology. . . . [T]he purpose of section 222(a) was to set forth the general parameters of *who* would be covered by the new rules contained in the other subsections. Before the 1996 Act, the rules only applied to AT&T, the [Bell Operating Companies], and GTE. Section 222(a) changed that by extending the general duty to protect proprietary information to *all* telecommunications carriers, while sections 222(b) and (c) detail *when* and *how* that duty is to be exercised.[12]

In this regard, it is no surprise that, as the *Order* observes, in adopting Section 222(c), Congress identified a scheme for protecting the confidentiality of CPNI, though "[t]he statute is silent on the implementation of this general duty as it applies to customer [proprietary information] more

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were read to confer enforceable obligations that are independent of, and that exceed, the requirements of subsections (b) and (c)." *Order* at 146, para. 346. In his dissent to the *Order*, Commissioner O'Rielly ably explains why this argument is a feckless effort to manufacture independent authority of Section 222(a). *See Order.* at 212, Dissenting Statement of Commissioner Michael O'Rielly (O'Rielly *Order* Dissent). Nevertheless, even if Section 222(a) did confer some independent authority *vis-à-vis equipment manufacturers*, the Commission's authority with respect to customers – the *sine qua non* of the *Order, e.g., Order.* at 145, para. 344 ("This Report and Order implements Section 222(a) with respect to 'customers'") – lies in Section 222(c). The *Order*'s circular attempt to claim otherwise, *see Order* at 150-56, paras. 354-63, fails for all of the reasons discussed below.

[11] *Order* at 146, para. 347.

[12] O'Rielly *Order* Dissent at 212 (emphasis in original).

broadly."[13] However, rather than backing that fact into a rationalization for broad authority under Section 222(a), as the *Order* somehow does,[14] the more reasonable interpretation is that, as Commissioner O'Rielly wrote dissenting to an earlier Commission decision, "the general duty in section 222(a) was intended to be read in conjunction with, not separate from, the specific limitations in sections 222(b) and (c). . . . [T]he Commission [has] viewed them as co-extensive."[15]

Reframing an argument advanced in the *NPRM*,[16] the *Order* suggests that subsections (b) and (c) merely "impose specific requirements on telecommunications carriers to address concerns that were particularly pressing at the time of Section 222's enactment," while Section 222(a) "allow[s] the Commission to adopt broader privacy protections to keep pace with the evolution of telecommunications services."[17] However, the fact that the Commission equated Section 222(a)'s reference to "proprietary information of . . . customers" with CPNI for over 18 years subsequent to enactment of Section 222 – by which time the Commission could have long since moved on to privacy concerns beyond CPNI – undermines the *Order*'s predication that

[13] *Order* at 154, para. 360.

[14] *See id.* Similarly, the *Order* bootstraps language from Section 222(c) to expand the definition of "confidentiality" in its bloated view of the scope of Section 222(a). *See id.* at 155-56, para. 363.

[15] *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, 13352, Dissenting Statement of Commissioner Michael O'Rielly (2014) (*TerraCom NAL*).

[16] "We recognize that earlier Commission decisions focused primarily on Section 222(c)'s protection of CPNI, and could be read to imply that CPNI is the only type of customer information protected. However, those decisions simply did not need to address the broader protections offered by Section 222(a) . . . ." *NPRM*, 31 FCC Rcd at 2594, para. 298.

[17] *Order* at 146-47, para. 347.

Section 222(a) is a broadly-encompassing privacy protection mechanism that has lain fallow for 18 years.[18]

As the Supreme Court has admonished, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[19] The *Order's* attempt to avoid the applicability of this recent Supreme Court pronouncement is unavailing. The *Order* attempts to broaden the scope of Section 222(c) to apply not just to CPNI,[20] pointing out that the Commission "has exercised regulatory authority under Section 222(c) for approximately two decades and oversaw certain carriers' handling of customer [proprietary information] for over two decades before that."[21] However, the reference to two decades of exercising authority under Section 222(c) is a non-sequitur relative to Section 222(a), and the reference to overseeing carriers' handling of "customer proprietary information" for two decades before that is disingenuous. As Commissioner O'Rielly recounted in his dissent

[18] *See, e.g., Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6931, para. 6 (2007) (*2007 CPNI Order*) ("Every telecommunications carrier has a general duty pursuant to section 222(a) to protect the confidentiality of *CPNI*.") (emphasis added); *see also infra* Sec. II.C.

[19] *Utility Air Regulatory Grp. V. EPA*, 134 S. Ct. 2427, 2444 (2014) (citation and internal quotation marks omitted).

[20] *Compare Order* at 150, para. 353 ("Even assuming a contrary reading of Section 222(a) , subsection (c) would still invest the Commission with substantial regulatory authority over *personal information* that [broadband ISPs] and other telecommunications carriers collect from their customers") (emphasis added) *with* 47 U.S.C. § 222(h)(1) (actually defining CPNI, with much more specificity).

[21] *Order* at 150, para. 353.

to the *TerraCom NAL*, what predated the 1996 Act were *CPNI* rules, not broader rules governing "customer proprietary information."[22]

In the final analysis, the *Order* essentially writes Section 222(h)(1), defining CPNI, out of the statute. By its own admission, it "uphold[s] the specific statutory terms that govern CPNI, while adapting these to the broader category of customer [proprietary information]."[23] But in so doing, it renders the specific definition of CPNI superfluous,[24] and ironically employs the provisions of Section 222(c) specifically applicable to CPNI in an effort to broaden the scope of Section 222(a) and, in the process, limit the reach of Section 222(c).[25] By the *Order*'s own recognition, such an interpretation of the language and structure of Section 222 cannot stand.[26]

**B. Legislative History of Section 222(a)**

The legislative history of Section 222 also evinces that subsection 222(a) does not create some additional or different category of protected customer information beyond CPNI.[27] In fact, there was no subsection (a) setting forth a "general" obligation in either the House or Senate version of the legislation that became the 1996 Act; both bills contained provisions addressing only CPNI and carrier proprietary information. The Senate bill contained only a CPNI obligation that was limited in its application to the Bell Operating Companies;[28] the House Bill

[22] *See TerraCom NAL*, 29 FCC Rcd at 13351, Dissenting Statement of Commissioner Michael O'Rielly.

[23] *Id.* at 153-54, para. 359.

[24] *Id.* at 151, para. 355 ("we are convinced that the term 'network' should not be read into Section 222(a)").

[25] *See id.* at 150, 153-56, paras. 353, 359-63.

[26] *See id.* at 148-49, para. 350 (rendering a statutory provision superfluous is contrary to the canons of statutory construction).

[27] *See* ITTA Comments at 6-7.

[28] S. Rep. No. 104-23, 104th Cong., 1st Sess. at 23-24 (1995).

similarly contained only a CPNI obligation.[29] Tellingly, while a "House amendment" *would* have empowered the FCC to create additional privacy rules, the House-Senate Conference *rejected* that provision.

In fact, subsection 222(a) appears for the first time in the House-Senate Conference version of the bill, and the solitary explanatory paragraph states: "In general, the new section 222 strives to balance both competitive and consumer privacy interests *with respect to CPNI*," and then simply recites the subsection.[30] While the *Order* endeavors to rebut all of the above evidence of legislative intent,[31] nowhere does it even attempt to explain away this direct invocation of CPNI in the *only* explanation of the origin of Section 222(a). Had Congress intended the sweeping breadth of Section 222(a) that the *Order* strains to finesse, one would think such a statutory lynchpin would have merited more than one sentence of discussion. Thus, the *Order*'s reading of legislative history does nothing to resuscitate its gasping view of Section 222's language and structure.

**C. The Commission's Consistent Interpretation of Section 222**

For over 18 years following enactment of the 1996 Act, the FCC consistently and repeatedly equated subsection 222(a)'s introductory reference to "proprietary information of . . . customers" with subsection 222(c)'s detailed elaboration of that term as CPNI.

In its initial order implementing Section 222, the Commission – in fidelity to the explicit legislative history just quoted – referenced "the duty in section 222(a) upon all telecommunications carriers to protect the confidentiality of *customers' CPNI*."[32] The

[29] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 89-91 (1995).

[30] H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 205 (1996) (emphasis added).

[31] *See Order* at 151-52, para. 356.

[32] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report

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Commission comprehensively itemized the types of information Section 222 addresses – none of which included "customer proprietary information" that does not qualify as CPNI. Specifically, the Commission explained that "Sections 222(a) and (b) . . . establish obligations and restrictions in connection with carrier proprietary information" and that "Section 222 sets forth three categories of customer information to which different privacy protections and carrier obligations apply – individually identifiable CPNI, aggregate customer information, and subscriber list information."[33] In the same document, the Commission opened a Further Notice of Proposed Rulemaking in which it sought comment on, among other things, "what, if any, further enforcement mechanisms . . . may be necessary to encourage appropriate carrier discharge of their duty under section 222(a) to protect the confidentiality of customer information."[34] But in subsequent orders, the Commission repeatedly and expressly declined to either address this question or to adopt any rules whatsoever relating to Section 222(a).[35] It finally dropped the issue entirely in adopting a later FNPRM that focused only on carrier proprietary information.[36]

Throughout the ensuing years, the Commission continued to make clear Section 222(a)'s reference to "customers" meant CPNI. And the Commission continued to reiterate its

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and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8203, para. 208 (1998) (emphasis added).

[33] *Id.* at 8064, para. 2 & n.4.

[34] *Id.* at 8202, para. 207.

[35] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14412, para. 1 n.1 (1999) (*1999 CPNI Reconsideration Order*); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506, para. 1 n.2 (2001).

[36] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002).

description of the categories of information governed by Section 222 – notably excluding each time any mention of customer information that does not qualify as CPNI.[37] The import of these orders is unmistakable: "Every telecommunications carrier has a general duty pursuant to section 222(a) to protect the confidentiality of *CPNI*."[38]

It was not until October 2014, in a decision issuing a Notice of Apparent Liability in a Lifeline enforcement action, that a bare majority of the Commission, contradicting its longstanding precedent, expansively interpreted subsection 222(a).[39] That notice, however, has no precedential effect, among other reasons because the case was settled.[40] Moreover, the other

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[37] *See id.* at 14864, para. 6; *2007 CPNI Order*, 22 FCC Rcd at 6930, para. 4 n.7. The Commission's continued equating of customer information under Section 222 with CPNI well into the first decade of the 21st century belies the *Order*'s rationalization that such an equating was merely an "early focus" relative to the enactment of Section 222. *See Order* at 152, para. 357.

[38] *2007 CPNI Order*, 22 FCC Rcd at 6931, para. 6 (emphasis added). *See also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 21 FCC Rcd 1782, 1784, para. 4 (2006) (same).

[39] *See TerraCom NAL*.

[40] *TerraCom, Inc. and YourTel America, Inc.*, Order, 30 FCC Rcd 7075, 7084, Attach., Consent Decree at para. 20 (EB 2015) (the decree "shall not be used as evidence or precedent in any action . . . or proceeding, except an action to enforce this [decree]"); *see NPRM*, 31 FCC Rcd at 2641-42, Dissenting Statement of Commissioner Michael O'Rielly at n.2 ("the Commission cannot adopt rules solely on the basis of tentative conclusions in an NAL," which itself "was unlawful" insofar as "parties had no notice that the Commission would find independent authority in section 222(a)").

In the *TerraCom NAL*, the only support for the Commission's new interpretation of its authority under Section 222 was a single sentence in the *2007 CPNI Order* stating that "[w]e fully expect carriers to take every reasonable precaution to protect the confidentiality of proprietary or personal customer information." *2007 CPNI Order*, 22 FCC Rcd at 6959, para. 64 (quoted in *TerraCom NAL*, 29 FCC Rcd at 13330, para. 13). But the next two sentences of the *2007 CPNI Order* make clear the Commission was referring to CPNI, not some broader category of customer information: "Of course, we require carriers to implement the specific minimum requirements set forth in the Commission's rules. We further expect carriers to take additional steps to protect the privacy *of CPNI* to the extent such additional measures are feasible for a particular carrier. *2007 CPNI Order*, 22 FCC Rcd at 6959, para. 64 (emphasis added). Further, the immediately preceding and following paragraphs likewise contain no fewer than seven explicit references to CPNI. *See id.* at 6959-60, paras. 63, 65. In a footnote, the *TerraCom NAL*

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two FCC orders espousing this novel view of subsection 222(a) – the *Open Internet Order*, which spawned the *NPRM*, and whose own citation of precedent regarding subsection 222(a) was taken out of context;[41] and a June 2015 Lifeline Order[42] – improperly relied upon the *TerraCom NAL*.

The most the *Order* is able to muster in response to the weight of precedent is "we do not believe this precedent should constrain our efforts in this proceeding," and that the Commission had "strongly implied" in 2007 that Section 222(a) covers customer proprietary information beyond CPNI.[43] "Strong implications" and mere hand-waving at inconvenient precedent simply do not cut the mustard.[44] Neither does resorting to an argument that those who do not find authority for the *Order* in Section 222(a) have failed because they have not proven a negative.[45]

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also cited a sentence from the *2013 Declaratory Ruling* stating that "subsection (a)'s obligation to protect customer information is not limited to CPNI that the carrier obtained or received." *TerraCom NAL*, 29 FCC Rcd at 13331, para. 16 n.37 (quoting *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Declaratory Ruling, 28 FCC Rcd 9609, 9618, para. 27 (2013) (*2013 Declaratory Ruling*)). Again, as the context makes clear, the Commission was emphasizing in the *2013 Declaratory Ruling* that *receipt of* information that otherwise would be CPNI is not a prerequisite to protection under Section 222(a): "The fact that CPNI is on a device and has not yet been transmitted to the carrier's own servers . . . does not remove the data from the definition of CPNI.: *2013 Declaratory Ruling*, 28 FCC Rcd at 9618, para. 27. That Commission statement thus *confirms* that Section 222(a) applies to CPNI only and not to customer information more broadly.

[41] *See Open Internet Order*, 30 FCC Rcd at 5616, 5820-24, paras. 53, 462-67 (citing the *TerraCom NAL*, and aforementioned statements from the *2013 Declaratory Ruling* and *2007 CPNI Order*, *see supra* note 41).

[42] *Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7895-96, para. 234 (2015).

[43] *Order* at 152, para. 357.

[44] The *Order* also asserts that an "early focus on CPNI" made sense contextually for why it took the Commission 18 years to finally expound upon Section 222(a). *See supra* note 38 and accompanying text for why that argument is inapposite.

[45] *Order* at 152, para. 357 ("the Commission has never expressly endorsed the view that Section 222(a) fails to reach customer information beyond CPNI").

### D. There is No Other Source of Legal Authority for the *Order*

The *Order* concludes that Sections 201(b) and 202(a) of the Act provide an independent legal basis for the *Order*.[46] The *Order* cites the *Open Internet Order* for the proposition that "'practices that fail to protect the confidentiality of end users' proprietary information' are among the potential carrier practices that are 'unlawful if they unreasonably interfere with or disadvantage end-user consumers' ability to select, access, or use broadband services, applications, or content.'"[47] In addition, the *Order* maintains, "Sections 201(b) and 202(a) provide backstop authority to ensure that no gaps are formed in Congress' multi-statute regulatory framework governing commercial privacy and data security practices."[48]

In the *1999 CPNI Reconsideration Order*, the Commission expressly declined to give credence to the *Order*'s principal alternative sources of authority, "conclud[ing] that the specific consumer privacy and consumer choice protections established in Section 222 supersede the general protections identified in sections 201(b) and 202(a)."[49] In his dissent to the *NPRM*, Commissioner O'Rielly rhetorically addressed why these original provisions of the Act do not provide the requisite legal authority for the *Order*'s actions: "[W]hy would Congress subsequently have adopted a privacy provision for telephone call records—section 222---if all of these other sections already contained the necessary authority to regulate privacy and security? Such a reading would render an entire provision superfluous."[50]

The *Order* augments that "asserting Sections 201(b) and 202(a) as a basis for our rules merely preserves consistent treatment of companies that collect sensitive customer information—

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[46] *See id.* at 158, para. 369; 47 U.S.C. §§ 201(b), 202(a).

[47] *Id.* at 157, para. 368 (quoting *Open Internet Order*, 30 FCC Rcd at 5662, para. 141).

[48] *Id.* at para. 369.

[49] *1999 CPNI Reconsideration Order*, 14 FCC Rcd at 14491, para. 153.

[50] *NPRM*, 31 FCC Rcd at 2643, Dissenting Statement of Commissioner Michael O'Rielly. *See also* O'Rielly *Order* Dissent at 214.

including Social Security numbers and financial records—regardless of whether the company operates under the FCC's or FTC's authority."[51] Aside from adding nothing as far as an argument for statutory authority to adopt the *Order*'s measures, it is the height of *chutzpah* to use "consistent treatment of companies" under different statutory purviews as a source of authority for treating them differently in actuality in several significant respects.[52]

In sum, no other source of legal authority cited in the *Order* empowers the Commission to adopt the *Order*'s measures.

## III. CONCLUSION

The *Order* takes a revisionist, result-driven approach that runs afoul of cardinal rules of statutory interpretation and the Commission's own long-held adherence to its governing law. Rather than attempting to rewrite the Act, the Commission should remain faithful to the statute

[51] *Order* at 158, para. 369.

[52] For instance, by requiring opt-in notice for web browsing history and application usage data, the *Order* departs substantially from the FTC's approach to a sensitivity-based framework. Likewise, the *Order* diverges from the FTC framework in its limiting of inferred consent to first party marketing within a service category as well as in other respects. *See* O'Rielly *Order* Dissent at 215-18; *Order* at 209-11, Dissenting Statement of Commissioner Ajit Pai (describing the "vast differences" between the *Order*'s approach and the FTC's regime); Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-106 (filed Oct. 21, 2016).

and Congress' stated intent in crafting it, and recognize that the *Order*'s interpretation is untenable. For the foregoing reasons, the *Order* must be vacated.

Respectfully submitted,

By: /s/ Michael J. Jacobs

Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, DC 20005
(202) 898-1520
gmorelli@itta.us
mjacobs@itta.us

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